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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

VANNA SISOUNTHONE,

Defendant and Appellant.

C077702

(Super. Ct. No. 12F00885)

Defendant Vanna Sisounthone robbed three convenience stores while wearing a clown mask. Convicted of multiple counts of robbery and other crimes and sentenced to more than 58 years in state prison, defendant appeals.

On appeal, defendant contends: (1) trial counsel's representation was constitutionally deficient because he did not object to the introduction of lay opinion, (2) the prosecutor committed prejudicial misconduct by soliciting lay opinion, (3) the evidence was insufficient as to one count of robbery because the victim did not possess

the money, (4) the conviction for assault with a firearm must be reversed because the trial court did not instruct the jury on all elements of the offense, (5) the trial court imposed unauthorized sentences for attempted robbery, (6) the court erred by imposing consecutive sentences, (7) the court erred by failing to give reasons for imposing consecutive sentences, and (8) the court acted in excess of its jurisdiction when it allowed the prosecution to amend the information to change a prior conviction allegation after the jury had been discharged.

We conclude that, as to the last contention, the trial court failed to obtain defendant's waiver of a jury trial as to the new prior conviction allegation. The remaining contentions are without merit. Based on these conclusions, we strike the trial court's true finding on one prior conviction allegation and the associated one-year sentencing enhancement, and we affirm the judgment as modified.

BACKGROUND

Although defendant's identity as the perpetrator was hotly contested at trial, the issue of identity does not figure prominently in the resolution of the issues on appeal. Under these circumstances, a brief summary of the crimes suffices. We recount pertinent details later in the discussion.

On the evening of January 19, 2012, defendant entered Cigaretteland, wearing a clown mask and armed with a firearm. Balli Birring was working there, while Jesse Mejia was visiting the store. Defendant ordered Birring to give him the money from the cash register, which Birring did. Defendant turned back toward Mejia and fired a shot, shattering a glass cooler next to Mejia. Defendant left the store with the money, firing the gun at least once more as he left. The final shot did not do any damage.

Later on the same night, defendant entered Bill's Liquor, wearing the clown mask and armed with a firearm. Shari Mayer and Vickie LaFollette were working in the store at the time. Defendant demanded the money, pointing the gun at both women. And he

fired the gun towards the side of Mayer's leg. Defendant took the money and left. No bullet or damage was found from a gunshot.

Two nights later, on January 21, 2012, defendant entered Better Trade Market, wearing the clown mask and armed with a firearm. In the market at the time were, among others, the owners Bikram and Rajwant Dhillon and Bikram's father Baldev Dhillon, who was visiting the store. Defendant pointed the gun toward the counter area and demanded the money. Within moments, defendant pointed the gun at Baldev, and Baldev heard a metallic click as if defendant had tried to shoot him. Baldev punched defendant and tried to take the gun. Unsuccessful in taking the gun as defendant began to flee, Baldev grabbed the mask off defendant's head as defendant left the store.

Some of the witnesses thought defendant's accent sounded Hispanic but others thought he might be Asian or a Pacific Islander. After defendant was identified as a suspect, a search of his car and his home revealed clothing worn by defendant in the robberies and other crimes. DNA on the mask was from more than one person, including defendant.

The district attorney charged defendant by information; the jury convicted defendant on all counts and found all enhancement allegations true; and the court found true the prior conviction allegations, as follows (with eventual sentence imposed):

Cigaretteland

- Count one: second degree robbery of Balli Birring (Pen. Code, § 211),¹ with discharge of a firearm (§ 12022.53, subd. (c))—five years doubled to 10 years for the prior strike, plus 20 years for the firearm discharge, for a total of 30 years.

¹ Hereafter, unspecified code citations are to the Penal Code.

- Count two: assault with a firearm on Jesse Mejia (§ 245, subd. (a)(2)), with personal use of a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1))—consecutive one year (one-third the middle term) doubled to two years for the prior strike, plus one year four months (one-third the middle term) for the firearm use, for a total of three years four months.
- Count three: false imprisonment of Jesse Mejia (§ 236), with personal use of a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1))—eight months (one-third the middle term) doubled to one year four months for the prior strike, plus one year four months for the firearm use, for a total of two years eight months, stayed.
- Count four: false imprisonment of Balli Birring (§ 236), with personal use of a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1))—consecutive eight months (one-third the middle term) doubled to one year four months for the prior strike, plus one year four months (one-third the middle term) for the firearm use, for a total of two years eight months.

Bill's Liquor

- Count five: second degree robbery of Shari Mayer (Pen. Code, § 211), with personal use of a firearm (§ 12022.53, subd. (b))—consecutive one year (one-third the middle term) doubled to two years for the prior strike, plus three years four months (one-third the middle term) for the firearm use, for a total of five years four months.
- Count six: second degree robbery of Vickie LaFollette (Pen. Code, § 211), with personal use of a firearm (§ 12022.53, subd. (b))—consecutive one year (one-third the middle term) doubled to two years for the prior strike, plus three years four months (one-third the middle term) for the firearm use, for a total of five years four months.

Better Trade Market

- Count seven: attempted second degree robbery of Baldev Dhillon (§§ 211, 664), with personal use of a firearm (§ 12022.53, subd. (b))—eight months (one-third the middle term) doubled to one year four months for the prior strike, plus three years four months (one-third the middle term) for the firearm use, for a total of four years eight months, stayed.
- Count eight: attempted second degree robbery of Rajwant Dhillon (§§ 211, 664), with personal use of a firearm (§ 12022.53, subd. (b))—consecutive eight months (one-third the middle term) doubled to one year four months for the prior strike, plus three years four months (one-third the middle term) for the firearm use, for a total of four years eight months.

Prior Convictions

- Prior conviction one: first degree burglary (§ 459) in 1989, as a strike—consecutive five years.
- Prior conviction two: charged as a prison term for a prior conviction for possession of a firearm by a convicted felon (former § 12021) in 2009 but amended after the jury was discharged to a prison term for a prior conviction for possession of ammunition by a convicted felon (former § 12316, subd. (b)(1)) in 2009—consecutive one year.
- Prior conviction three: failing to register as a sex offender (§ 290, former subd. (g)(2)) in 2004—consecutive one year.

The trial court imposed an aggregate determinate term of 58 years four months in state prison.

DISCUSSION

I

Effective Assistance of Counsel re Lay Opinions

Defendant contends that trial counsel was constitutionally ineffective because he did not object to many instances in which the prosecutor elicited inadmissible lay opinions. While showing surveillance videos of the various crimes, the prosecutor asked the witnesses on the stand what they saw in the videos. We conclude defendant's ineffective assistance of counsel contention is without merit because he cannot establish prejudice. The jury also saw what was on the videos, and there is no reason to believe the jurors relied on the lay opinion of the witnesses rather than their own perceptions. In other words, there is no reasonable probability defendant would have obtained a more favorable result if counsel had objected and the testimony had been excluded.

To demonstrate ineffective assistance of counsel, a defendant must show two things: deficient representation and prejudice resulting from the deficient representation. The standard for deficiency is that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. The standard for prejudice is that there is a reasonable probability the defendant would have obtained a better result absent the deficiency. (*People v. Avena* (1996) 13 Cal.4th 394, 418; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674, 693-694, 697-698].) If there is no showing of prejudice, we need not examine counsel's performance. (*Strickland v. Washington, supra*, at p. 697.)

During trial, the prosecution showed surveillance videos of the crimes while various prosecution witnesses were on the stand, and the prosecutor asked the witnesses questions about what they were seeing in the videos. Those witnesses included: (1) Jesse Mejia, one of the victims of the Cigaretteland robbery, (2) Officer Darren Marks, who investigated the Cigaretteland robbery and was not a percipient witness of that crime,

(3) Shari Mayer, one of the victims of the Bill's Liquor robbery, (4) Vickie LaFollette, another victim of the Bill's Liquor robbery, and (5) Officer Robert Zeiger, who investigated the Bill's Liquor robbery and was not a percipient witness of that crime.

In defendant's opening brief on appeal, he quotes long passages of questioning of those witnesses. However, he focuses in on several representative passages in his argument. We quote here the passages quoted in the argument section of defendant's contention, with the understanding that they are representative of many other instances of the testimony of the witnesses concerning what they saw on the videos.

Questioning of Jesse Mejia:

“[Prosecutor:] Can you describe what the clown-masked man is—has on his shoulder? Can you see that?

“[Jesse Mejia:] It looks like a bag. [¶] . . . [¶]

“[Prosecutor:] Now, going back to looking at 2018020 [a time stamp on the video]. We can focus on the—the clothing as the masked man's getting over the counter. We'll wait 'till we get to that point and I'll pause it. [¶] Now, specifically, what color shoes do you see that he's wearing?

“[Jesse Mejia:] They look like white shoes to me. [¶] . . . [¶]

“[Prosecutor:] Okay. And what color is that bag?

“[Jesse Mejia:] Looks black.”

Questioning of Shari Mayer:

“[Prosecutor:] Well, look at—does he also have—like he's carrying something?

“[Shari Mayer:] I—don't know. I mean—

“[Prosecutor:] Well, I can go forward little bit, see if you recognize what he's holding over his shoulder.

“[Shari Mayer:] A backpack.

“[Prosecutor:] Look like—

“[Shari Mayer:] Maybe.

“[Prosecutor:] Do you remember it?

“[Shari Mayer:] I don’t. No, I don’t. Sorry.

“[Prosecutor:] That’s okay. [¶] And we’ll do the color—People’s Exhibit 3.

Camera angle three—excuse me, still on People’s Exhibit 5. [¶] Are you able to see better now that it looks like he’s wearing camouflage—

“[Shari Mayer:] Yes.

“[Prosecutor:] —shorts over jeans?

“[Shari Mayer:] Yes.”

Questioning of Vickie LaFollette:

“[Prosecutor:] Does it appear to be camouflage shorts?

“[Vickie LaFollette:] Yes.

“[Prosecutor:] Did you tell it looks like he’s wearing a black jacket?

“[Vickie LaFollette:] Yes.

“[Prosecutor:] Okay. And there appears to be a bag or something that’s hanging over the shoulder; is that fair?

“[Vickie LaFollette:] I didn’t notice that at although [*sic*].

“[Prosecutor:] You didn’t notice. But as you see here—

“[Vickie LaFollette:] I see, yes.

“[Prosecutor:] —as you look at this video surveillance, you see what appears to be a bag hanging over the shoulder; is that right?

“[Vickie LaFollette:] Yes.

Instead of determining whether this testimony constituted inadmissible lay opinion (see Evid. Code, § 800) and whether trial counsel’s representation was deficient for not objecting to the evidence, for the purpose of our ineffective assistance of counsel analysis, we move directly to a determination of whether there is a reasonable probability

the defendant would have obtained a better result if the lay opinions had been excluded. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-688, 697.)

Defendant attempts to establish prejudice by arguing that this case was actually a closer case than the DNA evidence would have one suppose. He argues: (1) there was DNA from three individuals on the mask, (2) the witnesses described a Mexican accent or a Spanish or Asian man, and (3) witnesses were unable to identify defendant as the perpetrator. However, this approach is futile because he makes no showing that, if the jury had not been exposed to the lay opinions, it would have reached different conclusions about what was on the videos. Without that kind of showing, there is no showing of prejudice because defendant would have been convicted even if lay opinions had not been admitted. We also note that the trial court, at sentencing, characterized the evidence against defendant as “absolutely overwhelming.” Having failed to establish that the jury would have arrived at different conclusions concerning what was to be perceived from the video evidence, defendant fails to establish that he would have obtained a better result if trial counsel had objected to the prosecutor’s questions eliciting lay opinions.

II

Alleged Prosecutorial Misconduct re Lay Opinions

In the alternative, defendant contends that the prosecutor committed prejudicial misconduct by soliciting the assertedly inadmissible lay opinions during the viewing of the surveillance videos. Again for the purpose of argument we assume the lay opinions were inadmissible. Nonetheless, this prosecutorial misconduct contention was forfeited because defendant did not object to admission of lay opinions. Also, even if we reach the issue under the argument that failing to object to the asserted prosecutorial misconduct constituted ineffective assistance of counsel, defendant still has not established prejudice.

Generally, while it may be argued on appeal that a prosecutor committed misconduct by intentionally soliciting inadmissible opinion testimony, failure to object to

the questioning in the trial court forfeits appellate review. (*People v. Hinton* (2006) 37 Cal.4th 839, 869; Evid. Code, § 353, subd. (a).) There was no objection in this case.

Defendant argues we should ignore the failure to object because this case was closely balanced and the acts of asserted misconduct contributed materially to the verdict. (See *People v. Lambert* (1975) 52 Cal.App.3d 905, 908.) While we disagree that this case was closely balanced, we need not provide an analysis of the strength of the prosecution's case because there is no showing that the asserted misconduct contributed materially to the verdict. As we observed with respect to his ineffective assistance of counsel argument, defendant makes no attempt to establish that the jury would have drawn different conclusions from the surveillance videos if there had been no lay opinion concerning what was on those videos. The jurors saw for themselves what the witnesses purported to describe.

Finally, defendant argues that we should ignore the forfeiture problem because trial counsel provided constitutionally deficient representation by failing to object to the asserted misconduct. The analysis provided in part I applies equally here because the evidence relevant to this contention—meaning the assertedly inadmissible lay opinions—is the same. Since defendant cannot establish prejudice, his ineffective assistance of counsel argument is without merit. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 697.)

III

Sufficiency of Evidence of Robbery

Defendant contends there was insufficient evidence to convict him of attempted robbery of Baldev Dhillon, a family member of the Better Trade Market store owners, because Baldev did not have at least constructive possession of the store's money. The contention is without merit because the jury could reasonably infer from the evidence that defendant was attempting to rob Baldev of Baldev's own money.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [61 L.Ed.2d 560].) Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“Robbery is defined as ‘the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.’ ” (*People v. Anderson* (2011) 51 Cal.4th 989, 994; § 211.) Attempted robbery requires proof of a specific intent to commit robbery and a direct, ineffectual act toward its commission. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) “Under general attempt principles, commission of an element of the crime is not necessary.” (*Ibid.*) Thus, “neither a completed theft [citation] nor a completed assault [citation], is required for attempted robbery.” (*Id.* at pp. 694-695.)

Seventy-six-year-old Baldev Dhillon, formerly a police officer in India, was in Better Trade Market in Sacramento on January 21, 2012. He was in town visiting his son (Bikram Dhillon) and daughter-in-law (Rajwant Dhillon), who jointly own the market. When Baldev visits the area from his home in Canada, he goes to the market and, in his words, “do[es] whatever here and there” in the family store.

On that day in January 2012, Baldev was standing in front of the counter, arranging some merchandise, when defendant entered the store wearing a mask. Defendant pointed a gun at the counter and said, “Give me all the money.” When defendant saw Baldev, he turned and went toward Baldev rapidly, pointing the gun at him. When Baldev heard a click from the gun, he responded by punching defendant, who

then ran back toward the door where he had entered. As defendant was fleeing, Baldev grabbed the mask and removed it from defendant's head.

Defendant contends the evidence of attempted robbery was insufficient because Baldev had neither actual nor constructive possession of, in defendant's words, "the money sought to be taken." (Unnecessary capitalization omitted.) This contention makes an unwarranted assumption—that is, that defendant sought to take only the store's money. The evidence does not support defendant's assumption; instead, it supports a reasonable inference that defendant intended to take money from Baldev too.

The jury could infer from the evidence that defendant believed Baldev to be in possession of money. The evidence of that belief was that, after defendant said, "Give me all the money," he pointed the gun at Baldev. There is no evidence that defendant was taking a hostage in order for the owners to give him the money or any other similar scenario. There is also no evidence that defendant limited his demand for money to the money belonging to the store's owners. Since defendant believed Baldev was in possession of money, the evidence was sufficient to convict of attempted robbery without an analysis of whether Baldev was in constructive possession of the store's money. Defendant intended to rob Baldev and took a direct, ineffectual act toward its commission. (*People v. Medina, supra*, 41 Cal.4th at p. 694.)

IV

Omission of Elements in Jury Instruction

Defendant contends that his conviction in count two for assaulting Jesse Mejia with a firearm must be reversed because the trial court failed to instruct the jury on three of the four elements of the crime. Applying recent California Supreme Court precedent that such error is subject to a harmless-beyond-a-reasonable-doubt standard for prejudice, we conclude the instructional error was harmless because the instructional error did not contribute to the verdict.

A. *Procedural Background*

When the trial court instructed the jury, both in the oral instructions and in the written instructions, the court left out three of the four elements of assault with a firearm. As to assault with a deadly weapon, the trial court instructed the jury, using, for the most part, the language of CALCRIM No. 875:

“The defendant is charged in Count Two with assault with a firearm in violation of Penal Code section 245.

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person;

“Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

“The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

“The touching can be done indirectly by causing an object to touch the other person.

“The People are not required to prove that the defendant actually touched someone.

“The People are not required to prove that the defendant actually intended to use force against someone when he acted.

“No one needs to actually have been injured by defendant’s act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was.

“A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.” (Original italics.)

The three elements of the crime that the trial court left out of the instructions were: (2) “[t]he defendant did that act willfully”; (3) “[w]hen the defendant acted, [he] was aware of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in the application of force to someone;” and (4) “[w]hen the defendant acted, he had the present ability to apply force [with a firearm].” (CALCRIM No. 875.)

Although the instruction on assault with a deadly weapon left out three of the four elements, another instruction filled one of the gaps. As to the willfulness requirement (element (2)), elsewhere in the instructions, the trial court instructed the jury that assault with a firearm is a general intent crime and added: “For you to find a person guilty of [assault with a firearm], that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law.”

B. *Legal Analysis*

Failure to instruct on all elements of a charged crime is serious constitutional error. (*People v. Merritt* (2017) 2 Cal.5th 819, 821 (*Merritt*).) We generally apply the harmless beyond a reasonable doubt standard to determine prejudice when a trial court fails to instruct on an element. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 350.) Here, defendant asserts that the error in this case was structural error that was reversible per se because the trial court withdrew from the jury’s consideration substantially all of the elements of assault with a deadly weapon. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1315.) While this case was pending in this court, however, the California Supreme Court overruled *Cummings* and held that the harmless-beyond-a-reasonable-doubt

standard applies to all cases of misinstruction, including when the court failed to instruct on substantially all elements of the crime. (*Merritt, supra*, at p. 831.)

“ ‘In deciding whether a trial court’s misinstruction on an element of an offense is prejudicial to the defendant, we ask whether it appears “ ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” ’ ’ ’ [Citations.]” (*People v. Wilkins, supra*, 56 Cal.4th at p. 350.) In other words, the error is harmless under the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]) if it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” (*Neder v. United States* (1999) 527 U.S. 1, 18 [144 L.Ed.2d 35, 53].) “Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.” (*Id.* at p. 19.)

In *Merritt*, the Supreme Court held that the failure to instruct on the elements of robbery was harmless beyond a reasonable doubt because the crimes were recorded and the defendant, while challenging identity, conceded that whoever committed the crimes was guilty of robbery. (*Merritt, supra*, 2 Cal.5th at pp. 822, 831-832.)

Here, the uncontroverted testimony as to count two was that someone (and the jury concluded it was defendant) entered Cigaretteland, aimed a firearm in Mejia’s direction, and discharged the firearm. The jury knew that, to find defendant guilty of assault with a firearm, it would need to find defendant did an act with the firearm that by its nature would directly and probably result in the application of force (element (1)). Also, defendant had the present ability to apply force (element (4)), as the jury found that he used (and discharged) a firearm. And the jury necessarily found willfulness (element (2)) because the instruction on wrongful intent, as it relates to assault with a firearm, informed

the jury that, to find defendant guilty, it would have to conclude that defendant intentionally committed a wrongful act.

The only remaining element for which there was no instruction was that defendant was aware of facts that would lead a reasonable person to believe that his act would directly and probably result in the application of force (element (3)). In his briefing, defendant claims that he was not necessarily aware that the gun would launch a projectile because, during the other robberies, it appears that the gun fired without launching a projectile. He recognizes, however, that the gun launched a projectile when he fired it at Jesse Mejia. Even in light of this evidence, defendant argues that only speculation supports a finding that the jury would have concluded that defendant was aware of facts that would lead a reasonable person to believe that firing the gun in Mejia's direction would directly and probably result in the application of force. The argument is unconvincing. Defendant fired a loaded gun at Mejia, shattering the glass cooler next to Mejia, and the jury necessarily found that he committed an act with a firearm that by its nature would directly and probably result in the application of force to Mejia (element (1)). It strains credulity to argue that the jury would have concluded that defendant was not aware of facts that would lead a reasonable person to believe that his act would directly and probably result in the application of force.

On this record, the elements of assault with a firearm were clearly established, even if the trial court left out three of the four elements when instructing the jury. The error was harmless beyond a reasonable doubt.

V

Unauthorized Sentences for Attempted Robbery

The trial court imposed sentences for count seven and count eight (both attempted second degree robberies) by properly applying section 213, subdivision (b), which provides: "Notwithstanding Section 664, attempted robbery in violation of paragraph (2) of subdivision (a) [attempted second degree robbery] is punishable by imprisonment in

the state prison.” (See also § 18, subd. (a) [providing terms of 16 months, two years, or three years for felonies].) In his opening brief, defendant, relying on section 664, contends, and the Attorney General agrees, that the sentence must be corrected. However, in his reply brief, defendant withdraws the contention, recognizing that section 213, subdivision (b) defeats his contention. We therefore need not consider the contention further.

VI

Consecutive Sentencing

Defendant was convicted in count two of assault with a firearm on Jesse Mejia at Cigaretteland and in count four of felony false imprisonment of Balli Birring, also at Cigaretteland. The trial court sentenced defendant to consecutive terms for those two crimes. In his opening brief, defendant contended that the trial court violated section 654 by imposing consecutive sentences for those counts. In his reply brief, however, he withdraws the contention, conceding that section 654 is not applicable, as shown in the Attorney General's brief. We therefore need not consider the contention further.

VII

Court's Reasons for Imposing Consecutive Sentencing

The trial court failed to provide its reasons for imposing consecutive sentencing on counts two, four, five, and six, but defense counsel failed to object. On appeal, defendant asserts error and, acknowledging the forfeiture in failing to object, claims that counsel violated his right to counsel by failing to object. We conclude the sentencing issue was forfeited and defendant has not established ineffective assistance of counsel on appeal.

In the probation report, the probation officer listed the criteria affecting consecutive or concurrent sentencing. The two listed criteria, which both supported consecutive sentencing, were that (1) "[t]he crimes involved separate acts of violence or threats of violence, against separate victims," and (2) "[t]he crimes were committed at different times or separate places, rather than being committed so close in time and place as to indicate a single period of aberrant behavior." These are two of the criteria supporting consecutive sentencing in California Rules of court, rule 4.425. Citing these two criteria from rule 4.425, the probation officer recommended consecutive sentencing.

At sentencing, the trial court indicated that it had considered the probation report. And the prosecutor argued that the trial court should follow the probation officer's

recommendation on sentencing. On the other hand, defense counsel asked the trial court to exercise its discretion and impose a shorter term, although counsel did not specify imposing concurrent rather than consecutive sentencing.

When the trial court imposed the consecutive terms, the court did not give its reasons for imposing them consecutively. And defendant did not object to the trial court's failure to give reasons for imposing consecutive sentencing.

While the trial court had discretion to impose consecutive sentencing, it was required to give its reasons for doing so. (§ 1170, subd. (c) ["The court shall state the reasons for its sentence choice on the record at the time of sentencing"]; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117 ["A consecutive sentence requires the sentencing judge to articulate a statement of reasons"]; Cal. Rules of Court, rule 4.406(b)(5) ["Sentence choices that generally require a statement of a reason include . . . [¶] . . . [i]mposing consecutive sentences"].)

A sentencing court's failure to state reasons for imposing a consecutive sentence is reversible error. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 545.) But a defendant's failure to object to the trial court's failure to state its reasons for imposing a consecutive sentence forfeits the error on appeal. (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1084.)

Recognizing defense counsel's failure to object, defendant claims the failure constituted ineffective assistance of counsel. We conclude he has not carried his burden on appeal to show that the purported deficient performance by his counsel was prejudicial to him (that is, it is reasonably probable the court would not have imposed consecutive terms had his counsel timely and specifically objected to its failure to state its reasons on the record). (*Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.)

The trial court's reasons for imposing consecutive sentencing appear in the record. The probation report accurately listed criteria favoring consecutive sentencing: (1) separate acts against separate victims and (2) crimes at different times in different places.

Although the trial court did not state these reasons on the record, it said that it had considered the probation report.

On appeal, defendant argues that (1) the trial court may not have known that it had discretion to impose concurrent sentencing and (2) he “was prejudiced because had the trial court been informed by defense counsel that [concurrent sentencing was available], [he] may have received concurrent sentences on counts two, four, five, and six.”

First, the record does not fairly establish that the trial court did not know it had discretion to impose concurrent sentencing. There would have been no reason for the probation officer to list the criteria favoring consecutive sentencing in the probation report if the trial court did not have discretion concerning whether to impose consecutive sentencing. The court’s review of the probation report certainly bore that out. Additionally, the probation report stated that the probation officer recommended consecutive sentencing; the report did not state that consecutive sentencing was mandatory.

And second, merely speculating that the trial court may have imposed concurrent sentencing if counsel had mentioned it does not establish prejudice. As noted, there were good reasons for imposing consecutive sentencing in this case. Therefore, the failure of defense counsel to object to the failure of the trial court to give reasons was not prejudicial because it is not reasonably probable defendant would have obtained a better result.

VIII

Amendment of Prior Conviction After Jury Discharged

After the jury found defendant guilty of the substantive crimes and the trial court discharged the jury, the prosecutor moved to amend the second prior conviction in the information by alleging that defendant had a prior conviction and prison term for possession of *ammunition* by a convicted felon. Before the amendment, the second prior conviction in the information had alleged that defendant had a prior conviction and prison

term for possession of a *firearm* by a convicted felon. Defense counsel agreed that the amendment was appropriate. The court granted the motion to amend and, without asking defendant to waive jury trial on the newly alleged prior conviction, found true the prior conviction and prison term, adding one year to defendant's sentence of more than 57 years. On appeal, defendant contends the amendment was in excess of the trial court's jurisdiction because the jury had been discharged. We conclude defense counsel waived any defect in the amendment by agreeing to it; however, the trial court did not obtain a waiver of defendant's jury trial rights as to the newly alleged prior conviction.

A defendant has a statutory right to be tried on prior conviction allegations by the same jury that decided the issue of guilt. (§ 1025, subd. (b).) “[I]n the absence of a defendant's forfeiture or waiver, section 1025, subdivision (b) requires that the same jury that decided the issue of a defendant's guilt ‘shall’ also determine the truth of alleged prior convictions. Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged.” (*People v. Tindall* (2000) 24 Cal.4th 767, 782 (*Tindall*).) Permitting a post-jury-discharge amendment to the information is in excess of the trial court's jurisdiction. (*Id.* at pp. 769-770.)

In this case, the prosecutor alleged three prior convictions before trial. The second prior conviction allegation stated that defendant had a prior conviction and associated prison term for violation of former section 12021, possession of a firearm by a convicted felon. In pretrial proceedings, defendant agreed to bifurcation of the trial on the prior convictions from the trial on the substantive crimes, and he expressly waived his right to have a jury trial on the prior convictions.

After the jury returned its verdicts on the substantive crimes, the trial court discharged the jury. Later, in proceedings leading up to the trial of the prior conviction allegations, the prosecutor moved to amend the second prior conviction allegation,

changing the crime for which defendant had been convicted and served a prior prison term to violation of former section 12316, subdivision (b)(1), possession of ammunition by a convicted felon. (Stats. 2005, ch. 681, § 1, p. 5428.) In response to the oral motion, defense counsel said: “I agree that’s what he was actually convicted of. So it would be appropriate.” The trial court granted the motion to amend the information. The court then proceeded to a court trial on the three prior conviction allegations and found each of them true. At sentencing, the trial court imposed a consecutive one-year term for the prison term associated with the second prior conviction. (§ 667.5, subd. (b).)

The trial court violated section 1025, subdivision (b), as interpreted in *Tindall*, and the act was in excess of the trial court’s jurisdiction because it added a new allegation to the information after the jury was discharged. (*Tindall, supra*, 24 Cal.4th at p. 782.) But the Attorney General argues that there was no error here because: (1) the amendment merely corrected a clerical error, and (2) defendant waived or forfeited the section 1025, subdivision (b) error. We conclude that, although the amendment was more than correction of a clerical error, defense counsel waived the jurisdictional problem with the amendment.

This was not merely correction of a clerical error. As defendant points out, if he had been tried on the allegation that he had a prior conviction for possession of a firearm by a convicted felon, the allegation would have been found untrue by the trial court. The amendment changed the crime in the prior conviction allegation and made it possible for the trial court to find the prior conviction allegation true; therefore, the amendment was more than just correction of a clerical error.

But defense counsel waived any defect in granting the amendment by agreeing that the amendment was appropriate. A defendant may waive this statutory right to have the same jury try both the substantive crimes and the prior conviction allegations. Counsel did so here by agreeing to the amendment. (*Tindall, supra*, 24 Cal.4th at p. 782.)

But that is not the end of the problems caused by the prosecutor's sloppy pleading and practice. Defendant did not waive his constitutional right to a jury trial on the new allegation that he had a prior conviction and prison term for possession of ammunition by a convicted felon. Defendant waived his right to a jury trial on the prior convictions before trial, but those prior convictions did not include the second prior conviction that the court, acting without a jury, eventually found true. At the time of the amendment, defense counsel agreed to the amendment, but neither he nor defendant waived jury trial.

In *People v. Luick* (1972) 24 Cal.App.3d 555, the court held that a defendant's waiver of a jury trial before prior conviction allegations were added did not extend to those allegations. The court wrote: "[W]here allegations of priors are added *after* a jury waiver, defendant must, personally and expressly, waive jury trial on the issue thus presented." (*Id.* at p. 559, original italics; see also *People v. Diaz* (1992) 3 Cal.4th 495, 565 [holding that to waive the right to a jury trial on both guilt and special circumstances, "[t]he waiver must be made by the defendant personally, and must be 'separate'—that is, if the defendant is to be deemed to have waived the right to jury trial on both guilt and special circumstances, the record must show that the defendant is aware that the waiver applies to each of these aspects of trial."].)

Because defendant was improperly tried by the court on a prior conviction for which he did not waive a jury trial, we must strike the true finding and associated one-year term on the second alleged prior conviction.

DISPOSITION

The judgment is modified by striking the true finding on the second prior conviction and prison term (for possession of ammunition by a convicted felon) and by striking the associated one-year enhancement imposed for that prior prison term. As modified, the judgment is affirmed. The matter is remanded to the trial court for

preparation of an amended abstract of judgment and delivery of the amended abstract of judgment to the Department of Corrections and Rehabilitation.²

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

MAURO, J.

² We also note that the abstract of judgment inaccurately characterizes the violations of section 211 as burglaries or attempted burglaries. The abstract must be corrected to reflect that those convictions were for robberies or attempted robberies.